IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. BAENDER,
Appellant,

vs.

FRANK BARNET, as Sheriff of Alameda County, California,
Respondent.

Appellant's Opening Brief

Upon Which the Matter Will Be Submitted.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States, and to the Court:

This is an appeal from a judgment and order of the District Court of the United States for the Southern Division of the Northern District of California, M. T. Dooling, Judge, sustaining a general demurrer to appellant's complaint and petition for a writ of *habeas corpus* and denying the petition. The petition for discharge under the writ is based on the contention that the judgment in execution of which petitioner, appellant here, was and is being restrained of his liberty is void, for the reason that that portion of section 169 C. C. U. S. upon which the indictment in his case was pre-

dicated is invalid under the Fifth Amendment to the Constitution of the United States and the laws enacted thereunder, and because the said District Court had no jurisdiction over the subject matter. *Habeas corpus* is the proper remedy in such cases. In re *Swan*, 150 U. S. 637; in re *Tyler*, 149 U. S. 164; ex parte *Siebold*, 100 U. S., 371. The verified complaint states the facts surrounding appellant's case, and *these are not disputed*. The denial by the court below of appellant's petition was based on the opinion of that court that the clause of the statute involved is constitutional, and this is the only question now presented for determination.

The test of the constitutionality of a statute is not what was done under it but what may be done thereunder. *Minn. Brewing Co.* v. *McGillivray*, 104 Fed. 258; *Rochester* v. *West*, 164 N. Y., 510; *Gilman* v. *Tucker*, 128 N. Y., 190. And this is common sense, for if the statute was invalid when enacted, what was done in appellant's case could not make it valid.

I.

"Whoever, without lawful authority, shall make, or cause or procure to be made, or shall willingly and or assist in making, any die, hub, or mold, or any part thereof, either of steel or plaster, or any other substances whatsoever, in the likeness or similitude as to the design or the inscription thereon, of any die, hub, or mold designated for the coining or making of any of the genuine gold, silver, nickel, bronze, copper, or other coins of the United States, that have been or hereafter may be coined at the mints of the United States; or *who-*

> *ever, without lawful authority, shall have in his possession any such die,* hub, or mold, *or any part thereof,* or shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned, *shall be fined not more than five thousand dollars and imprisoned not more than ten years.* Section 169 C. C. U. S.

As is shown in paragraph VII of the verified complaint, the portion of the statute italicized is that upon which the indictment in appellant's case was based and its validity is the only question here presented. This statute formerly denounced a possession "with intent to fraudulently use the same". These words were "intentionally dropped from the statute" by Congress on the recommendation of the Committee on Revision, and for the reason that the Government should not be required to prove what was in the accused's mind, but that *the accused should be required to explain his possession to the satisfaction of the jury. Baender* v. *U. S.*, 260 Fed., 833. It is important to bear this history and this reason in mind.

It will be seen that possession of a die is criminal under this statute if only *without lawful authority.* Under a strict construction—and this is a penal statute —every person who might obtain or receive possession of such a die, whether by the purchase of some junk in which the die was contained unknown to him, as is admittedly the case here, or whether by having it surreptitiously placed on his person, or in his home, would be

guilty of crime. Under such an interpretation this statute is manifestly void. It is not a revenue measure, nor does it pertain to the class, "Offences Against the Laws of Nations". Yet the Circuit Court of Appeals, while not deciding the question here presented, held that this clause contains all the elements of the offense. *Baender* v. *U. S.*, 260 Fed., 834. But the learned judge of the District Court, in his opinion in this proceeding, tacitly admitting the invalidity when literally construed, contends that the possession intended to be punished is a conscious and willing one in addition to being without lawful authority.

It is axiomatic that Congress could intend to punish only what the Constitution gives it the power to punish. That Instrument provides:

> "The Congress shall have power—to provide for the punishment of counterfeiting the securities and current coin of the United States." Art. 1, Sec. 8, Par. 6.

Hence, unless such a possession, conscious, willing and unauthorized though it be, can be considered as "counterfeiting the current coin of the United States", or some included offense such as an attempt, Congress would have no power to punish it. Where the intent to use the die fraudulently accompanies the possession it could be punished only upon the theory that this would be an *attempt* to counterfeit, and an attempt is part of the act. But, as stated, the "intent" was *pur-*

posely eliminated from the statute. On the other hand, there can be no crime without the intent. This is elemental. What, then, did Congress intend to punish? It is evident that Congress could not and did not intend to punish a mere conscious, willing and unauthorized possession, for the Constitution specifically limits its power to punish *counterfeiting*, and such a possession is no more counterfeiting than a similar possession of a gun would be murder. Nor is it an attempt, for the requisite intent to make it such has been purposely eliminated. From a consideration of the report of the Committee on Revision, the decision of the Circuit Court of Appeals in Baender v. U. S., *supra*, Chap. VII of the Penal Code and the statute itself, it is apparent that Congress intended to make such a possession criminal *unless the defendant could explain the possession to the satisfaction of the jury.* No other conclusion can be logically reached. It is likewise evident that the necessary evil intent was not meant to be inferred from the possession, as is maintained by the Circuit Court of Appeals, at p. 834. It would be extremely illogical, to say the least, to declare that Congress *purposely* deleted from the statute the evil intent, *expressed in plain words*, and then assert that it still remained there concealed as an inference from the "possession." Especially is this true since *it was precisely from the "POSSESSION" that the evil intent was extracted.* Furthermore, possession of a die is not such an act, if it be an act, from which

the evil intent could be inferred, even had Congress not plainly shown that the intent was not to be inferred from "possession." *Kaye* v. *U. S.*, 177 Fed. 150. The conclusion is irresistible that the evil intent was not meant to be inferred by the jury from the possession, but *from the failure of the defendant to satisfactorily explain the possession.*

II.

The Circuit Court of Appeals in Baender v. U. S., supra, has impaled this statute upon two horns of a dilemma, either being fatal. It is asserted, A, "In enacting this statute—Congress intended that it should express all the elements of the crime", p. 834; and B, "Congress evidently intended that the unlawful possession of such dies should be sufficient evidence to warrant conviction, unless the accused could explain the possession to the satisfaction of the jury", p. 833. These two assertions are, at first, contradictory; for, assuming that the statute contains all the elements of the offense, there can be no *explanation* of the possession. The accused could show that he had no possession; that he had lawful authority therefor; or, that it was not conscious or willing, and *that is all.* Under this assumption he could not show that his possession was not for the purpose of "counterfeiting the current coin of the United States", because, this element being eliminated, and the offense being complete without it, testimony on this point would be immaterial.

A. If the statute makes a mere conscious, willing and unauthorized possession criminal, even adding two elements not enumerated, it is invalid. Congress could no more make such a possession of a die criminal than a similar possession of a tin whistle. Under any consideration, *an evil intent must be present to make "possession", or any act, criminal.*

Applying the procedure prescribed in *U. S.* v. *Carl* 105 U. S., 612, an examination of like statutes under the general title "Offences against the Coinage, etc.", Chap. VII of the Penal Code, discloses the intent of Congress. There is not another statute in this chapter in this class, that does not, in prohibiting "possession", express the "intent" in plain words. See Sections 150, 153, 154, 160, 163, 164, 165, 171. Surely, it would be absurd to say that such a possession of a die would be criminal, whereas a similar possession of a plate for printing counterfeit bills *is innocent;* Sec. 150. Manifestly, Congress intended here to punish such a possession only when accompanied by the requisite evil intent. *And that is all that Congress can do.* But by purposely deleting the "intent" from the statute, and particularly *from the "possession"*, Congress manifested its plain determination that the "intent" should not be an element *in the statute.* But in this shape the statute is void for there can be no crime without the evil intent; nor would the statute thus state such a crime as *counterfeiting.* Much more reasonable, but none the less deadly, is the other horn.

B, the accused shall be required to expalin the possession to the satisfaction of the jury. Here, again, the analogy held by the Circuit Court of Appeals to exist between this and the statute prohibiting the possession of imported opium, 38 Stat. 276, Sec. 4, fails at the crucial point. In the latter it is plainly provided that "such possession shall be deemed sufficient to warrant conviction, *unless the defendant shall explain his possession to the satisfaction of the jury.*" In the statute involved here, *no such provision is made.*

> "If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, *does not shut out* from the party affected a reasonable opportunity to submit to the jury in his defense *all* of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."
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> *Luria v. U. S.*, 231 U. S., 26 (Italics ours).

It is not claimed that the rule of evidence intended to be prescribed here is unreasonable, but it *is* claimed that party is shut out from an opportunity "to submit to the jury in his defense *all* of the facts bearing upon the issue". It is absolutely essential to due process of law that provision for a *complete* defense be made in a statute where, as here, the burden of proof is shifted, instead of limiting the accused to a rebuttal of elements that do not constitute a crime. Neither is it due process of law to leave the matter of a hearing to the discretion of the court, even could it be claimed that this statute does so.

"Nor can—a hearing granted as a matter of favor or discretion be deemed a substantial substitute for the due process of law that the Constitution requires.—*The law must—give the right to a hearing and an opportunity to be heard.* The soundness of this doctrine has repeatedly been recognized by this Court.—The right of a citizen to due process of law must rest upon a more substantial basis than favor or discretion. *The law must save the parties' rights* and not leave them to the discretion of the courts as such." (Italics ours).

Coe v. *Armour Fertilizer Works*, 237 U. S., 424, 425.

12 *Corpus Juris*, pp. 1234, 1235, with more than 500 authorities upon the point.

III.

Since the test to be applied to determine the validity of a statute is *what may be done under it*, and the evil intent being here eliminated, a person who finds such a die, or some part thereof, made of wood, putty, "steel or plaster, or any other substance whatsoever", *one-eighth of an inch or five feet in diameter*, and retains it as a curio, knowing or not knowing it to be a *die*, or some part thereof, would be guilty of crime under this statute if that die, or part, is "in the likeness—as to the—inscription thereon" of any properly designated die. It might be absolutely impossible to use it for counterfeiting purposes. And he would be equally guilty if he purchased some junk for use in his factory in which the die, unknown to him was contained, and found it later and placed it to one side with

the intention to subsequently turn it over to the police, or with no special intention at all. It can be readily seen that the accused must have the *statutory* right to explain to the jury not only his possession, but also the die, and "all of the facts bearing upon the issue", to show that his possession was not for the purpose of committing an "offence against the coinage". So, too, that the jury will not be compelled, by an arbitrary rule, to accept a mere conscious, willing and unauthorized possession as alone sufficient as a basis for their verdict. The Constitution provides that the trial of all crimes, except in cases of impeachment, shall be by jury." Art. III, Sec. 2, Par. 3. And, of course, this means that it shall be the *judgment* of the jury that shall be exclusively determinative of the guilt of the accused. But, under this statute, *no provision for an explanation having been made*, the jury is compelled by an arbitrary rule to convict. The statute makes the guilt *conclusive* upon proof of a mere conscious, willing and unauthorized possession, conceding two elements not mentioned, and the conviction would not be by the *judgment* of the jury as the Constitution provides, but *by Congress*.

> "It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict.—The point is that in such a case the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient, for the jury may accept it. And they have the express warrant of the statute to accept it as a basis for their verdict. And it is in this

light that the validity of the statute must be determined.—The normal assumption is that the jury will follow the statute and, acting in accordance with the authority it confers, will accept as sufficient what the statute expressly so describes.—So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

Bailey v. *Alabama*, 219 U. S., pp. 235, 237, 239.

Luria v. *U. S.*, 231 U. S., pp. 25, 26.

The last sentence of this ruling decision is particularly applicable here, for by this statute the party is certainly precluded from the right to present his defense to the main fact thus presumed—his guilt—for the *law* has not saved his rights. There can be no objection to a proper shifting of the burden of proof, but when, as here, the party is precluded from making the very proof shifted upon him the courts should not hesitate to interfere.

"As to presumptions, of course the legislature may go a good way in raising one, or in changing the burden of proof, but there are limits. It is essential that there shall be some rational connection between the fact proved and the fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.—It is not within the province of a legislature to declare an individual guilty or presumptively guilty of crime."

McFarland v. *Am. Sugar Ref. Co.*, 241 U. S., p. 86.

Luria v. *U. S.*, 231 U. S., p. 26.

There is certainly no rational connection between the "possession" considered here and "counterfeiting the current coin of the United States", for that very intent has been *purposely* dropped. And, to make the crime complete, the jury is confronted by the paradoxical proposition of inferring the evil intent, *not from the possession*, but from an explanation which the accused has been precluded from making. The result is that a defendant is declared conclusively guilty of crime upon proof of an innocent possession. A long line of decisions might be given here upon the point that a statute which arbitrarily prescribes that certain acts, innocent in themselves, shall constitute a crime, is void. Forbearance in this respect will be a virtue.

IV.

In *Kilbourne* v. *State*, 84 Ohio St. Rep., 247, the following statute was declared invalid by the Supreme Court of that State:

> "Whoever buys, receives, or unlawfully has in his possession any of the aforesaid articles, (nuts, bolts, journal-brasses, etc), shall upon conviction thereof, be imprisoned in the penitentiary not more than five years or less than one year, or not more than six months in the county jail or workhouse at the discretion of the court, which is hereby authorized to hear testimony in mitigation or aggravation of sentence." (Insert ours).

It will be noted that this clause is on all fours with that considered here, the only difference being in the

article the possession of which is prohibited. It might also be pertinent to note that a possession without lawful authority is not necessarily unlawful, but becomes so when accompanied by an evil intent.

In conclusion, the statute is void (a), if it contains all the elements of the offense, because such a possession is not criminal. The requisite evil intent having been purposely eliminated, the statute thus is ineffective to state an offense; (b), if the accused is required to explain his possession, from a failure of which the evil intent is to be inferred, he has been denied due process of law in having been shut out from making the explanation required. And in this case the jury is authorized by the statute to convict upon proof of facts which, *admittedly*, would not constitute a crime. And, if the clause of the statute involved here is invalid, then the court below had no jurisdiction of the subject matter, and the judgment based upon it, in execution of which appellant is being confined, is void.

Respectfully submitted upon this printed argument,

ALBERT E. CARTER,

Attorney for Appellant.

Signed at Oakland, Calif., Nov. 11, 1920.